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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CANTON RAILROAD COMPANY, *Appellant*

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF APPELLANT

JOHN HENRY LEWIN,
VENABLE, BAETJER AND HOWARD,
Attorneys for Appellant.

King Bros, Inc., Printers, 208 N. Calvert St., Baltimore, Md.

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I

In the Court of Appeals, the Contention was Raised that the Maryland Gross Receipts Tax Statute, insofar as the Tax is Measured by Gross Receipts Derived in Foreign Commerce, Contravenes the Commerce Clause, and that Question was Decided.

It is true that the Statement of the Case (R. 17-31), which was the factual statement upon which the appeal of the Canton Railroad was presented to the Court of Appeals, does not specifically say that the tax was assailed

before the State Tax Commission and the Circuit Court No. 2 of Baltimore City as repugnant to the Commerce Clause. Nor does the statement say specifically that the Circuit Court decided that question. But Canton's Petition of Appeal to the Circuit Court expressly alleged that the State Tax Commission erred in not holding that the tax contravened the Commerce Clause, and the fact that the Circuit Court upheld the tax under the Commerce Clause clearly appears from the Circuit Court's opinion (R. 12-17). In the very second paragraph of that opinion (R. 12) appears the holding, "Our Court of Appeals has held that this tax does not violate the Commerce Clause of the Federal Constitution (*Railroad v. State*, 92 Md. 668 (1901))", and this initial holding was the major premise of the Circuit Court's argument that, since the tax did not violate the Commerce Clause, by the same token, it did not violate the Import-Export Clause. The opinion further cites and attempts to distinguish the Commerce Clause cases which were urged upon it, such as *Joseph v. Carter and Weekes Stevedoring Co., Crew-Levick Co. v. Pennsylvania.* And finally, the Circuit Court goes so far as to hold directly that "these railroads do not engage in foreign commerce" (R. 17).

In the Court of Appeals, the Commerce Clause point was not formally assigned as error, for the reason that no Assignment of Errors is required in that Court, but in Canton's brief and argument it assailed the former decision of the Court of Appeals in *Cumberland and Pennsylvania Railroad Co. v. State*, 92 Md. 668, that the tax was valid under the Commerce Clause. And, in the Court of Appeals, as its opinion shows, both sides in argument cited and relied upon Commerce Clause cases, and, here again, the very cornerstone and basis of that Court's holding that the tax did not offend the Import-Export Clause was its preliminary holding that the tax was valid under the Commerce Clause. The pith of the Court of Appeals' decision is contained in the very last sentence

thereof (R. 44) in which it says, "On principle we see no reason why the franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes."

Surely, we must be permitted to assign as error in this Court an erroneous holding by the Court of Appeals which constituted *a necessary step* in arriving at its further erroneous conclusion that the tax was valid under the Import-Export Clause. Thus, on this point, our case differs completely from *White River Lumber Company v. Arkansas*, 279 U. S. 692, in which the statute was challenged in the State Courts solely on the ground that it denied equal protection on its face, and where, for the first time in this Court, the involved factual point was sought to be made that the statute, as it was administered in practice, denied equal protection. Our case also differs completely from *Thomas v. Iowa*, 209 U. S. 258; *Hiawassee River Power Company v. Carolina-Tennessee Power Company*, 252 U. S. 341; and *Whitney v. California*, 274 U. S. 357, in which the record and the opinions below showed that no Federal question whatever had been raised in the State Courts.

Appellees claim (Brief p. 5) that "The dissenting Judges of the Maryland Court of Appeals, moreover, found that the record before them did not present any contention founded upon the Commerce Clause (Canton R. 50)". The statement of the dissenting judges to which we are referred is to the direct contrary. They said (R. 50):

> "Under the Commerce Clause, since the recent cases and perhaps before, it may be that the Maryland gross receipts tax is constitutional as an 'in lieu' tax. *Canton*, but not Western Maryland, *disputes this proposition* on the facts, but the fact question, I think, is not adequately presented on the record". (Italics supplied.)

The dissent shows affirmatively that the Commerce

Clause point was disputed. The dissent is in error, we submit, in failing to find factual support for condemnation of the tax under that Clause *as an "in lieu" tax*. The Record clearly showed (1) that the "in lieu" tax was on the privilege of engaging in foreign commerce, and (2) that it was not a "just equivalent" for, but ten times greater than, ordinary property taxes for which it was substituted (R. 22).

II

The Maryland Statutes of 1945 and 1947 were Conditional Statutes, which never became Operative, have Expired by their Terms, and, if Effective, would be Discriminatory and Unconstitutional.

Appellees, on pages 15 and 16 of their brief, and the Court of Appeals (R. 39), relied on Laws of Maryland 1945 Chapter 965, and Laws of Maryland 1947, Chapter 677, in an attempt to show that the Maryland Gross Receipts Tax here challenged is, in amount, no more than a "just equivalent of ordinary *ad valorem* property taxes" for State purposes. Such an argument is misleading in the extreme. Both these statutes were temporary in nature and the conditional property taxes with which they were concerned have never been imposed. Both statutory provisions have expired by their terms. They were codified as Sections 7(15), 25(h), 94½ and 95 of Article 81 of the 1947 Supplement of the Maryland Code, solely through error of the codifier. *These statutes are mere threats.* The enormous taxes conditionally stipulated in these statutes would not be "ordinary taxes". They would be extraordinary taxes. Since they never became effective, their validity has never been challenged. Of course, if they became effective, they would be highly discriminatory and would be unconstitutional and invalid under the Due Process Clause of the Fourteenth Amendment, as well as under the Commerce Clause and the Import-Export Clause.

Reliance upon the untried and questionable tentative statutes is an attempt by Appellees to pull themselves up by their bootstraps.

The record shows (R. 21) that the gross receipts tax which Appellant pays annually is, in amount, over ten times greater than the ordinary *ad valorem* property tax for State purposes, which it would pay under existing law, if it were not subject to the gross receipts tax.

No one can validly argue that the gross receipts tax is no more than "a just equivalent" of ordinary non-discriminatory *ad valorem* State property taxes for which it is the substitute.

The tax assailed cannot be sustained under the Import-Export Clause as an "in lieu" tax, because "any" tax, in lieu or otherwise, is forbidden by that clause. It cannot be sustained under the Commerce Clause, because (1) it is a privilege tax on the privilege of engaging in foreign commerce, and (2) it yields far more than a "just equivalent" of ordinary property taxes.

III

Appellant was Engaged in the Importing and Exporting Process as that Term has been used in Cases Applying the Import-Export Clause

Appellees assert that the terms "exporting process" and "importing process", as used by this Court in condemning state taxes upon such processes, are "words of art" with special meaning. They say (p. 38) that "the term 'process' is used as a word of art to mean those transactions, in the case of exports, which begin at dock side". They imply that "importing process" means only those activities in relation to imports which take place before the goods arrive from abroad at the dock in this country. Hence, Appellees argue that these immune processes cannot include Canton's activities in handling and forwarding imports and exports at, and to and from, the docks within the State of Maryland.

The *answer* to, and *refutation* of, this argument is supplied by the holdings in *Brown v. Maryland*, 12 Wheat. (U. S.) 419 and *Cook v. Pennsylvania*, 97 U. S. 566 as to imports, and in *Fairbank v. U. S.*, 181 U. S. 283 and *Crew-*

Levick Co. v. Pennsylvania, 245 U. S. 292 as to exports.

In *Brown v. Maryland*, the State of Maryland made the very same argument but it was rejected by Chief Justice Marshall. Now, one hundred and twenty-three years later the same State still persists in the error.

In the *Cook* case, the auctioneer's services in selling, within the State of Pennsylvania, imports still in original packages were performed after the goods had left the dock side, but they were nevertheless held to be part of the importing process and the auctioneer was held to be immune from a state franchise or license tax sought to be imposed upon the privilege of performing these services.

In the *Fairbank* case, the activities of the initial railroad carrier performed in Minnesota, i.e. entering into a contract of affreightment there by issuing a bill of lading, were held to be part of the exporting process and immune under the Export Clause from a Federal privilege tax, although these services were performed hundreds of miles from the dock side.

In the *Crew-Levick* case, the exporter's activities were performed within the City of Philadelphia and not at or beyond the dock side, but they were nevertheless held immune from a state franchise or license tax sought to be imposed upon the privilege of engaging in such activities.

This Court in *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286, 288, had no hesitation in saying that, by the initial inland shipment of the gasoline from Grand Rapids to Detroit, "one step in the *process* of exportation had been taken".

IV

Appellant Admittedly Handled and Forwarded Imports and Exports, and not Freight Previously Imported or to be Exported.

In their Brief, pages 6, 52, Appellees assert that Canton's services were rendered upon articles "previously imported" and "to be exported". Knowing that this statement cannot be maintained *in the legal sense*, they qualify

it (p. 6) by the irrelevant phrase "in the geographical sense". Hence, they argue that, on the authority of cases like *Cornell v. Coyne*, 192 U. S. 418 (upholding a tax upon manufactured cheese intended to be exported but still in the hands of the manufacturer), the tax upon Canton's activities in forwarding exports is valid. And they argue that the tax upon Canton's activities in handling and forwarding of imports is valid on the authority of cases like *New York v. Wells*, 208 U. S. 14 (upholding a state property tax upon the proceeds of imports sold, which proceeds the importer had not remitted at once to the exporter but had mingled with his other working capital—an illustration of a broken original package); and upon cases like *Peck & Co. v. Lowe*, 247 U. S. 165, and *National Paper and Type Co. v. Bowers*, 266 U. S. 373 (upholding net income taxes upon net income derived from gross income, which in turn had been derived in part from the sale of imports and exports, on the theory that the thing taxed "is as far removed from exportation as are articles intended for export before the exportation begins").

The *answer* is that the basis of this argument flies directly in the face of the admitted facts, and of the controlling law, to the effect that the articles when handled and forwarded by Canton were then actually imports and exports. Admittedly, we are not concerned here with articles before they were exported or after their importation had ceased. Appellees state (p. 6) that they "accept the statement of the case" in Canton's brief. If so, (and they could not, in view of the stipulation of facts, do otherwise), they accept the statement of facts appearing upon pp. 5 and 6 of Canton's brief.

Hooven & Allison Co. v. Evatt, 324 U. S. 652, which Appellees do not question, directly holds that goods retained their status as imports even in the warehouse of the importer located in Xenia Ohio, until their original packages were broken.

Coe v. Errol, 116 U. S. 517, which Appellees do not question, announces the "true rule" that, as to "goods exported to a foreign country", they become exports when, delivered to the initial inland carrier, they "have started upon such transportation in a continuous route or journey".

For these reasons, the goods shipped in *Fairbank v. U. S.*, 181 U. S. 283, became exports immediately when they were shipped in Minnesota, although, no doubt, Appellees could argue that they were "to be exported in the geographical sense". The participation by this initial carrier in the exporting process which was sought to be taxed was performed wholly within the state of Minnesota. Nevertheless, the tax sought to be exacted from the initial railroad carrier in Minnesota for the privilege of entering into the contract of affreightment within that state was held invalid as a tax on exports.

Again, *Cook v. Pennsylvania*, 97 U. S. 566, struck down a franchise or license tax imposed upon a Pennsylvania auctioneer for the privilege of selling at auction imported goods still in their original packages, the auctioneer's activities being part of the importing process, although performed solely within the State of Pennsylvania after the ocean carriage had been completed.

The above argument of Appellees simply cannot stand with *Coe v. Errol*, *Hooven & Allison v. Evatt*, *Fairbank v. U. S.* and *Cook v. Pennsylvania*.

Respectfully submitted,

JOHN HENRY LEWIN,

VENABLE, BAETJER AND HOWARD,

Attorneys for Appellant.